IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. _____

GARY GILBERT CARLSON,
THOMAS NORRIS TRUAX,

Petitioners,

vs.

THE UNITED STATES
OF AMERICA,

Respondent.

PETITION FOR
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioners hereby pray for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the trial court as to them.

OPINIONS BELOW

Petitioners were convicted after a jury trial; judgment was entered thereon in the Unite States District Court for the Central District of California on December 21, 1972 and judgment was entered on January 22, 1973 whereby each of the defendants was sentenced to a term of two years imprisonment and are now free on bond pending Appeal. The United States Court of Appeals for the Ninth Circuit filed its Decisio on August 27, 1973, and no rehearing was sough The Decision of the Ninth Circuit Court is attached to this Petition as Appendix A.

JURISDICTION

This suit was originally brought in the United States District Court for the Central District of California. Jurisdiction was based upon an Indictment charging each of the defendants and petitioners herein in eleven separate counts of violation of Federal Statute, Title 18, U.S.C., Section 1461. The questions sought to be presented here were raised at the first available instance in the courts below, including questions raised before the Court of Appeals. This court's jurisdiction is invoked under Title 18, U.S.C., Section 1245(1).

QUESTIONS PRESENTED

The following questions are presented for determination by this Court:

1. Are admittedly inconsistent jury verdicts involving the substantially same material alleged to be obscene, grounds for reversal?

2. Where expert testimony is used by both sides, is the jury free to ignore all expert testimony and arrive at verdicts that are totally inconsistent with both the Government's experts and the defense expert testimony and which verdicts cannot be reconciled with either version of the so-called "expert testimony"?

3. Is Title 18, U.S.C., Section 1461 unconstitutional in light of the five cases decided by this Court on June 21, 1973?

STATUTE INVOLVED

Section 1461 of Title 18, U.S.C. provides in part:

> ". . . Whoever knowingly used the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered

by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

". . . Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . . .

". . . Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained. . . ."

REASONS FOR GRANTING PETITION FOR CERTIORARI

1. To determine whether a jury is free to convict a defendant in a criminal case of crimes involving use of the mails surrounding distribution of allegedly obscene materials and acquit the same defendant in other counts involving substantially the same materials where there is no question as to the use of the mails but the only questions raised is the obscene matter of the materials.

It is clear from the fact that the jury convicted the defendants in reference to the heterosexual film and acquitted as to the homosexual film, and convicted as to several counts involving advertisement material and then acquitted as to several more counts involving substantially the same advertising materials that they, the jury, were thoroughly confused by the expert testimony and could not have adopted either the Government's expertise or the defense expertise as the verdicts were inconsistent with either theory of expertise. It is obvious that the trial Court felt the same way in granting the Motion for Acquittal as to some of the counts involving the heterosexual film in that the Court states in granting the Judgment of Acquittal as to the heterosexual film,

> ". . . the movies are different but if there is a difference, the lesbian

movie is simply more obscene, if there is a difference in obscenity, and why the jury found it not to be obscene and the heterosexual movie to be obscene, for the life of me I can't understand. So for the purpose of having the verdicts consistent in an area in which there is so little consistency, I will grant the motion of acquittal on all counts except 8, 9 and 10 and the defendants will stand convicted on those counts." (R. T. p. 549, lines 18-25, R. T. p. 550, lines 1-3.)

It is obvious that the Court recognized the impropriety of the jury's inconsistency; however, it is submitted that the Court did not go far enough in this recognition and merely adds to the inconsistency by leaving some of the counts standing and acquitting as to others.

2. Where both sides have presented expert testimony and the jury has returned verdicts that are inconsistent with either the Government's expert or the defense expert, can the verdict stand on the basis that the jury either did not listen to the evidence or was totally confused thereby and thereby did not render a fair and impartial verdict.

Expert testimony was submitted, both by the Government and by the defense. The Government offered two alleged experts; one

being a Catholic priest who the Government purports to have been an expert in national community standards, and the other being a psychiatrist by the name of Blaine McLaughlin. The defense called as an expert, Robert Doud, who is a medical educator. The Government's "Experts" both testified that in their opinion, the three pronged tests of Roth were met, Roth v. U.S., 354 U.S. 476. However, the priest testified only on the issue of national community standards but conceded that the materials in question were consumed by the public in great quantities (R.T. p. 227, lines 9-15). The other Government expert, Dr. McLaughlin, testified that in his opinion, the materials in question were obscene; however, Dr. McLaughlin admitted that materials such as the ones in question were used in experiments in conditioning homosexuals to become heterosexuals as part of psychiatric and psychological therapy in academic and clinical institutions (R.T. p. 338, lines 15-23 and R.T. p. 339, lines 8-25; R.T. p. 340, lines 1-18). Dr. Doud testified that the materials were not obscene under any of the three pronged tests. Dr. Doud defined prurient interest as a sick or morbid interest as opposed to a healthy interest in sex and concluded that the average adult would not have a sick or morbid interest in the materials in question but would have a healthy or curious interest in the materials in question, if anything.

3. Whether Title 18, U.S.C., Section 1461 has been declared unconstitutional by inference as a result of the five cases decided by this Court on June 21, 1973.

Initially, it should be noted that this Honorable Court did not affirm any of the cases where convictions had occurred, but vacated the judgments of the court below for further proceedings, consistent with the newly announced standard. At first blush, the five cases could be construed to be a more strict interpretation of standards of obscenity. However, this Honorable Court has not, since June 21, 1973, construed Title 18, U.S.C., Section 1461, and to be consistent in ordering the States to reconstrue their statutes to determine if they are consistent with this Court's opinion, it is urged that this Honorable Court must do the same in reference to the Federal Statutes. Presumably, the Federal Statute is based upon the Roth case, supra. It is urged that the California Statute is also based upon the Roth test, and yet this Court remanded the case of Miller v. California, one of the five cases, back to the California Supreme Court for such a determination. It is urged that under the new standards laid down by this Court, the petitioners herein are entitled to a new trial and are entitled to have a jury instructed on the new standards. It should be noted that of the eleven counts of the original Indictment against petitioners, two counts involved motion picture films and the remaining counts involved advertisements.

Ultimately, petitioners were acquitted of both films and some of the advertisements. No pandering instruction was given nor was any instruction given in the area of the question of whether materials were directed at a specific bizarre deviant group. It should be noted that expert testimony on both sides is to the effect that materials such as those in question were and are used in legitimate scientific experimentation in the reconditioning of homosexual behavior into heterosexual behavior.

CONCLUSION

For the reasons above set forth, a Writ of Certiorari should issue to review (and reverse) the judgment and opinion of the Court of Appeals.

Respectfully submitted,

BRUCE P. WOLFE

Attorney for Petitioners

APPENDIX "A"
OPINION OF THE COURT
BELOW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. GARY GILBERT CARLSON, THOMAS NORRIS TRUAX, *Defendants-Appellants.*	No. 73-1519 MEMORANDUM

[August 27, 1973]

Appeal from the United States District Court
for the Central District of California

Before: KOELSCH and CHOY, Circuit Judges, and EAST,* District Judge.

The jury found appellants guilty of interstate transportation of obscene heterosexual material, but not guilty of similar charges as to homosexual material. Appellants contend that such a verdict is inconsistent and should be reversed. We disagree.

We need not consider the government's arguments attempting to delineate the "substantial difference" between the two types of material. Even if inconsistent, the jury's verdict of conviction is not reversible. "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *Drum v. United States*, 284 U.S. 390, 393 (1931). See also *United States v. Zamora-Corona*, 465 F.2d 427, 428 (9th Cir. 1972); *Magnolia Motor & Logging Company v. United States*, 264 F.2d 950, 953 (9th Cir. 1959) *cert. denied* 365 U.S. 815 (1959).

Affirmed.

*The Honorable William G. East, Senior U.S. District Judge for the District of Oregon, sitting by designation.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 8-29-73—480

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-528

GARY GILBERT CARLSON AND
THOMAS NORRIS TRUAX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their convictions for mailing obscene matter should be reversed because the jury's guilty verdicts on some counts of the indictment were inconsistent with acquittal on other counts and ignored expert testimony; and that this Court's decisions in *Miller* v. *California*, No. 70-73, decided June 21, 1973, and companion cases[1] rendered 18 U.S.C. 1461, under which they were convicted, unconstitutional.

Following a jury trial in December 1972, in the United States District Court for the Central District of California, petitioners were convicted on three counts of mailing

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[1] *Paris Adult Theatre I* v. *Slaton*, No. 71-1051; *United States* v. *Orito*, No. 70-69; *United States* v. *12 200-ft. Reels of Super 8 mm Film*, No. 70-2; *Kaplan* v. *California*, No. 71-1422.

obscene advertisements in violation of 18 U.S.C. 1461. They were each sentenced to three concurrent two-year prison terms. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner Carlson, under the assumed names of Ralph Martin and Ralph Miller (R. T. 46-47, 392), and petitioner Truax operated a mail-order pornographic film business from offices in Torrance and Inglewood, California (R. T. 50, 56-58, 69-74, 99-104, 113-115, 138, 144-151; Gov. Exhs. 1, 5, 7B-7C). On May 9, 1972, petitioners rented an office at 1626 Centinela Avenue, Inglewood, California, and until November 1972, received mail at that office under the name of Ralph Miller (R. T. 99-105, 108-109). On June 1 and 2, 1972, three private citizens from different parts of the country received unsolicited advertisements for pornographic films from Ralph Miller, return address 1626 Centinela Avenue, Inglewood, California (R. T. 118-120; Gov. Exhs. 18-20). The advertisements consisted of a list of erotically suggestive film titles and an order blank and, on the other side of the page, a collage of explicit pictures depicting males and females engaged in various sexual acts (Gov. Exhs. 18-20).

The government presented two expert witnesses. Father Morton A. Hill, who served on the Presidential Commission on Obscenity and Pornography, testified that the advertisements violated community standards relative to the picturing of explicit sex acts (Tr. 213-216). Dr. Blaine McLaughlin, a psychiatrist who had done considerable work in the field of behavior in sexuality, applied the standards of *Roth* v. *United States*, 354 U.S. 476, to the advertisements and testified that, taken as a whole, they would appeal to the prurient interest of the average individual, that they offend national standards relating to the picturing of explicit

sex acts, and that they were utterly without redeeming social value (R. T. 300-306).

1. Petitioners' contention that their convictions should be reversed because the jury's guilty verdict on three of the counts is inconsistent with its acquittal on other counts was properly rejected by the court of appeals, in an opinion (Pet. App. A) on which we rely. Furthermore, even if the jury's verdict is inconsistent with the expert testimony, as petitioners allege, it is not invalid. This Court recently held in *Paris Adult Theatre I* v. *Slaton, supra,* that expert testimony was not required in obscenity cases when the obscene materials are placed in evidence, as they were here. Since the jury may determine the obscenity of materials without expert testimony, it is free to accept, reject or disregard, in whole or in part, any expert testimony presented on that issue.

2. Petitioners further contend that this Court's recent decision in *Miller* v. *California,* No. 70-73, decided June 21, 1973, and companion cases, rendered 18 U.S.C. 1461, under which they were convicted, unconstitutional. This Court in *United States* v. *12 200-ft. Reels of Super 8 mm Film, No. 70-2,* slip op. at 7, fn. 7 (decided June 21, 1973), held that the *Miller* standards were applicable to federal legislation; and that with respect to the constitutionality of federal obscenity statutes using the terms "obscene", "lewd", "lascivious", "filthy", "indecent", or "immoral" to describe regulated material, it would "construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller* v. *California, supra* [slip op. at 10-11]." Thus, this Court has already construed the terms used in federal obscenity statutes such as 18

U.S.C. 1461, and found that they meet the constitutional requirements set out in *Miller*.

This Court did not indicate in its opinion in *Miller* or its companion cases that the *Roth-Memoirs*[2] standards for judging obscenity, under which petitioners were convicted, allowed unconstitutionally stringent limitations on expression. Rather, the Court expressed its concern that since *Roth*, there had not been a single majority view as to the proper standards for testing obscenity. *Miller, supra*, slip op. at 7-8, 14-15, citing as an example, *Redrup* v. *New York*, 386 U.S. 767. By setting out definite standards in a majority opinion, the Court sought to give lower courts a reliable test by which they could judge obscene materials without being dependent upon the individual views of the Justices.

In cases subsequent to *Miller*, this Court has remanded to the courts of appeals, not the district courts, with explicit instructions to reconsider in the light of *Miller*. See, *e.g.*, *United States* v. *Palladino*, No. 72-1446, and *Ewing* v. *United States*, No. 71-182 (vacated and remanded, June 25, 1973); *Groner* v. *United States*, No. 72-1731, and *Harding* v. *United States*, No. 72-1646 (vacated and remanded, October 23, 1973). These actions indicate that this Court intended defendants convicted under the old standards to have the benefit of an independent appellate constitutional judgment under the new constitutional standards. It does not support petitioner's contention that this case should be retried under the new standards (Pet. 8).

The question whether a particular work is obscene involves a constitutional judgment which must be made

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[2] *Memoirs* v. *Massachusetts*, 383 U.S. 413.

by the appellate court. *Jacobellis* v. *Ohio,* 378 U.S. 184, 188. In cases in which courts of appeals have had an opportunity to review, under *Miller* standards, convictions obtained under *Roth-Memoirs* standards, they have not remanded to the district courts, but instead reevaluated the material involved, applying the new *Miller* standards, and affirmed the convictions. See, *e.g., United States* v. *Millican,* No. 73-1734 (C.A. 5, October 18, 1973); *Brown* v. *United States,* No. 71-1759 (C.A. 4, September 18, 1973); *United States* v. *Miller,* 482 F. 2d 1379 (C.A. 9); *Miller* v. *United States,* No. 23,935 (C.A. 9, August 6, 1973); *United States* v. *DePriest,* No. 72-1218 (C.A. 9, July 23, 1973); *United States* v. *Sians,* 481 F. 2d 1406 (C.A. 7). But see *United States* v. *Henson,* No. 73-2063 (C.A. 9, October 5, 1973), in which the government's petition for rehearing *en banc* is pending.

The court below has already had an opportunity to consider the materials herein under the *Miller* standard, and has affirmed the convictions.[3] Its failure to refer to *Miller* in its brief opinion presumably reflected the obvious obscenity of the material under any standards.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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[3] Briefs of the parties below were submitted before *Miller* was decided, but *Miller* was raised and considered on oral argument.

[4] See the government's Brief in Opposition in *Hamling, et al.* v. *United States,* No. 73-507 (filed December 7, 1973).